

This Opinion is Not a  
Precedent of the TTAB

Mailed: September 22, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Harry J. Binder and Charles E. Binder*

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Serial No. 88138741

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Thomas M. Galgano of Galgano IP Law PLLC, for Harry J. Binder and Charles E.  
Binder

Pauline Ha, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

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Before Thurmon, Deputy Chief Administrative Trademark Judge, Adlin and Dunn,  
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Harry J. Binder and Charles E. Binder (“Applicants”) seek registration on the  
Principal Register pursuant to a claim of acquired distinctiveness under Trademark  
Act Section 2(f), 15 U.S.C. 1052(f), of the proposed mark THE REP FOR VETS  
(standard characters) for “advocacy services, namely, legal, paralegal and non-

attorney representative services for claimants of veterans benefits” in International Class 45.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicants’ proposed mark THE REP FOR VETS on the ground that it is merely descriptive without sufficient evidence of acquired distinctiveness to support registration. Trademark Act Sections 2(e)(1) and (f); 15 U.S.C. 1052(e)(1) and (f).

After the Examining Attorney made the refusal final, Applicants filed a request for reconsideration and an appeal. Following denial of the request for reconsideration, the appeal was resumed. Applicants and the Examining Attorney filed briefs. We affirm the refusal to register.

### **I. Applicants’ Claim of Acquired Distinctiveness**

Applicants seek registration pursuant to Section 2(f). A claim of distinctiveness under Section 2(f), whether made in the application as filed or in a subsequent amendment, is construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“Where an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”); *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*,

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<sup>1</sup> Application Serial No. 88138741 filed October 1, 2018, asserting January 2010 as its date of first use anywhere and in commerce.

840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of distinctiveness as an established fact.”). The sole issue presented in this appeal is whether Applicants have shown the applied-for mark has acquired distinctiveness.

“To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005); *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012). To assess whether a mark has acquired distinctiveness, we must first determine “[w]here a mark sits on a sliding scale of descriptiveness.” *Royal Crown Co. v. The Coca-Cola Co., Inc.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018). “Highly descriptive terms are less likely to be perceived as trademarks, and therefore more substantial evidence of secondary meaning will ordinarily be required to establish their distinctiveness.” *Performance Open Wheel Racing, Inc. v. United States Auto Club Inc.*, 2019 USPQ2d 208901, \*7 (TTAB 2019).

**A. The Mark THE REP FOR VETS Is Highly Descriptive of Applicants’ Services**

Based on the evidence of record, we find that the mark THE REP FOR VETS is highly descriptive as applied to Applicants’ “advocacy services, namely, legal, paralegal and non-attorney representative services for claimants of veterans

benefits.” The article “the” in a mark generally lacks significance as a source indicator. *See In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005)(“First, we find that the definite article THE and the generic term BAR are not distinctive terms, and they add no source-indicating significance to the mark [THE GREATEST BAR] as a whole.”); *In re Weather Channel, Inc.*, 229 USPQ 854, 856 (TTAB 1985)(“Nor does the use of the word ‘the’ add any source-indicating distinctiveness to the term [THE WEATHER CHANNEL] sought to be registered). Applicants do not argue or present any evidence that the word “the” in their mark THE REP FOR VETS has trademark significance. Accordingly, we find that the term THE does not contribute to the distinctiveness of the remaining term REP FOR VETS when the term THE REP FOR VETS is applied to Applicants’ services.

The record includes dictionary excerpts from the online Oxford Dictionary defining the term “REP” as an abbreviation of “representative,” and defining “representative” as “a person chosen or appointed to act or speak for another or others.”<sup>2</sup> The preposition “for” is defined as “on behalf of” or “representing.”<sup>3</sup> The term “VETS” is defined as the plural form of the abbreviation for “veteran,” and “veteran” is defined as “a person who has served in the military.”<sup>4</sup>

Excerpts from the website of the U.S. Department of Veterans Affairs (VA) establish that veterans may claim a variety of veterans benefits including disability

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<sup>2</sup> January 18, 2019 Office Action, TSDR 6-7.

<sup>3</sup> February 7, 2020 Office Action, TSDR 18.

<sup>4</sup> *Id.* at TSDR 8-9.

compensation, health care, memorial benefits, education and training, home loans and housing-related assistance, pensions, employment services, life insurance, and spouse, dependent, and survivor benefits.<sup>5</sup> Applicants' identification of services identifies these generally as "veterans benefits." The VA website devotes a page to its "Accredited Representatives," specifically "an individual who has undergone a formal application and training process and is recognized by VA as being capable of assisting claimants with their affairs before VA:"<sup>6</sup>

The VA Office of the General Counsel maintains a list of VA-recognized organizations and VA-accredited individuals that are authorized to assist in the preparation, presentation, and prosecution of VA benefit claims. For more information on how to select a representative, find out who can charge fees relating to representation, file a complaint about your representative, or to dispute a charge by an agent or attorney based on reasonableness, please visit <https://www.va.gov/ogc/accreditation.asp>.

The reference to "an agent or attorney" seems to indicate that "representatives" may include attorneys or non-attorneys, and Applicants' identification of services indicates that Applicants provide both legal and non-legal representation.

The record includes pages from law firm, local government, college, and veterans organization websites which also offer veteran representative services, specifically to assist in filing VA claims; each referring to "vets" or "veterans" and "reps" or "representatives;" and in some cases also referring to the VA representative accreditation process. Pertinent webpage excerpts are shown below:

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<sup>5</sup> *Id.*, at TSDR 10-11.

<sup>6</sup> *Id.* at TSDR 13.

Federal or state agency to which you are admitted to practice

## Is a VA Certified Attorney Better than a Representative?

There is no way of knowing ahead of time if an attorney or non-attorney representative will be better suited at [appealing a VA decision](#). A lot of factors can weigh into how much an attorney or representative can help you with your claim, including:

Figure 1 Berry Law Firm<sup>7</sup>



Figure 2 Excerpt from Vietnam Veterans of America<sup>8</sup>

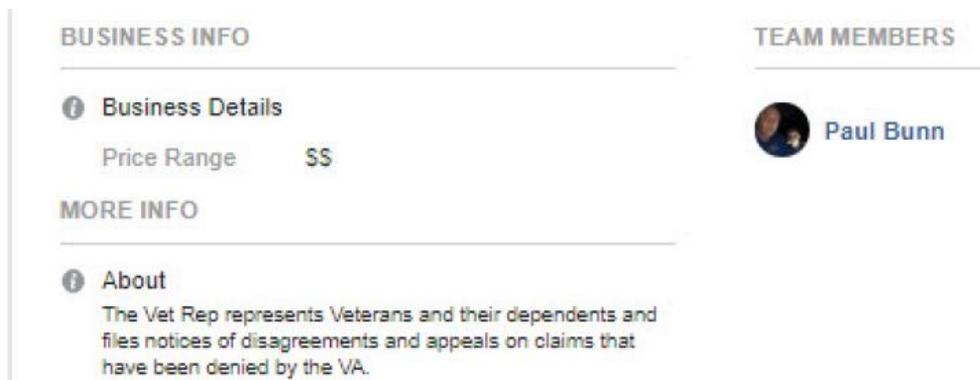


Figure 3 The Vet Rep Facebook page<sup>9</sup>

<sup>7</sup> July 18, 2019 Office Action, TSDR 8.

<sup>8</sup> *Id.* at TSDR 14.

<sup>9</sup> February 7, 2020 TSDR 20.

[Home](#) : **Disability Compensation**

## Disability Compensation

Disability compensation is a monthly benefit paid to veterans for any injury, condition, or illness that started in or was exacerbated by active service in the military. This benefit is tax free and also can be paid to veterans disabled from treatment in a VA healthcare facility.

Veterans may be eligible for disability compensation if they have a service-connected disability, often referred to as "S/C", and were discharged under other than dishonorable conditions. A service-connected disability does not have to be a combat injury; any injury or illness suffered or aggravated while in uniform can be considered. See the VA [Disability Compensation Rates for Veterans](#) page for actual payment amounts.

### How Do I File a Claim?

#### STEP 1: FILE A CLAIM

We recommend you work with a Veterans Representative at a [County Veterans Service Office](#) or Veterans Service Organization who can help you file your claim at no cost.

*Figure 4 CalVets California Department of Veterans Affairs<sup>10</sup>*

## Veterans Services

We proudly serve the veterans, dependents and survivors who live in Morrow County.

Hours: Irrigon Office: M-F 8am -5pm (Closed during the lunch hour & holidays)

Heppner Bartholomew Building: By appointment only.

You are invited to contact our office for assistance. Because of the nature of our services, an appointment is required to give you the attention you deserve. Call 541-922-6420

The Morrow County Veteran's Service Officer is an accredited VA representative who advocates for our community's veterans and their families to ensure they receive all entitlements provided by Federal and State law.

*Figure 5 Morrow County WA Veterans Services<sup>11</sup>*

<sup>10</sup> *Id.* at TSDR 10.

<sup>11</sup> *Id.* at TSDR 13.

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**Professional Accredited Representation:**

Professional trained and accredited service officers are available to assist our nations veterans and their families with processing their claims with the VA.

Our counselors are recognized under federal law by the U.S. Department of Veterans Affairs (VA) to provide legal representation for individuals in matters relating to VA law. That Asserted Representation establishes a "client-attorney relationship" with the same implied obligations as any attorney. By virtue of accreditation the Counselor has access to a nationwide network of Accredited Representatives who are able to provide expanded assistance, even before the Board of Veterans' Appeals in Washington, D.C..

*Figure 6 Broome Cty NY Veterans Services<sup>12</sup>*



Home / Assistance

## VA Claims & Separation Benefits

As the largest organization of combat veterans, we understand the frustrations that can arise when transitioning out of the military or filing a claim with the Department of Veterans Affairs. The claims process can be confusing and one that service members and veterans shouldn't try to navigate alone. That's why the VFW's **National Veterans Service (NVS)** was established to help all veterans, service members and their families.

NVS consists of a nationwide network of VA accredited service officers and pre-discharge representatives who are experts in dealing with the VA and are the key to your success. Our cadre of highly-trained and professional advocates help veterans

*Figure 7 Veterans of Foreign Wars<sup>13</sup>*

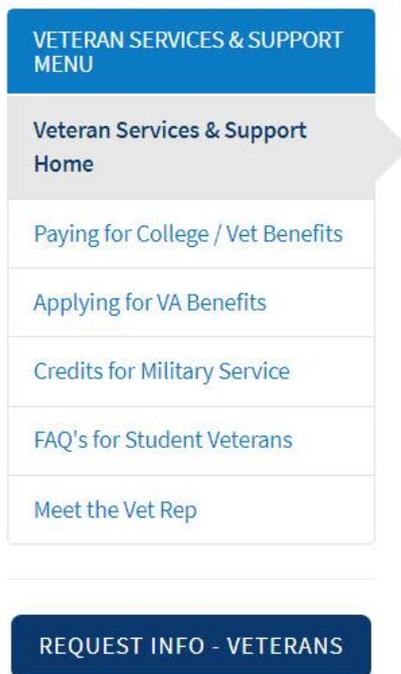
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<sup>12</sup> *Id.* at TSDR 11.

<sup>13</sup> *Id.* at TSDR 14.

Rob is admitted to practice before the State Courts of Ohio, the Federal District Court for the Southern District of Ohio, and the U.S. Supreme Court. He is also an accredited attorney representative with the VA and is admitted to practice in the United States Court of Appeals for Veteran's Claims. Rob is also admitted to and has argued before the United States Court of Appeals for the Sixth Circuit.

*Figure 8 Law firm of Horenstein, Nicholson & Blumenthal, LPA<sup>14</sup>*



*Figure 9 Mid Michigan College<sup>15</sup>*

For more information on accredited representation by the WDVA Claims Assistance Office, contact your local County Veterans Service Officer or the WDVA Claims Assistance Office at:

WDVA Claims Assistance Office  
c/o VA Regional Office

*Figure 10 Wisconsin Dept. of Veterans Affairs<sup>16</sup>*

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<sup>14</sup> *Id.* at 12.

<sup>15</sup> January 18, 2019 Office Action, TSDR 13.

<sup>16</sup> July 18, 2019 Office Action, TSDR 15.

**San Bernardino Vet Center**

(909) 801-5762

Offers: individual, group, marital, and bereavement counseling; assistance in applying for VA benefits; medical referrals/liaison with VAMS; employment referral/assistance from a **Vet Rep** with EDD; information and referral to community resources; sexual trauma counseling and referral; and community education.

*Figure 11 Riverside County CA Child Support Veterans Resources<sup>17</sup>*

The record also includes informal comments to online postings in which “vet reps” is used to denote “veterans’ representatives” or those who aid in obtaining veterans’ benefits.<sup>18</sup>

We also consider that Applicants’ specimen submitted with its application makes clear that Applicants can provide accredited representatives for veterans before the VA:<sup>19</sup>

Our lawyers and accredited agents are well qualified and experienced in dealing with the VA to protect your interests. The government calls them “Accredited Attorneys” and “Claims Agents.” We just call them “Our People.”

*See In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017) (“the TTAB did not err by considering the explanatory text of the specimens in the descriptiveness inquiry”); *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1958 (TTAB 2018) ((Board considered Applicant’s specimen in finding the mark descriptive and generic). Applicants’ Facebook page describes Applicants as “Representing

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<sup>17</sup> February 7, 2020 TSDR 25.

<sup>18</sup> *Id.*, at TSDR 19, 21, 22, 24, 27.

<sup>19</sup> October 1, 2018 application, TSDR 7.

Military Veterans Throughout the United States.”<sup>20</sup> We find that Applicants’ mark THE REP FOR VETS clearly and directly describes its services.

It is clear from the evidence of different entities devoted to providing representation for veterans seeking VA benefits, as well as Applicants’ use of the terms, that the combination of the descriptive terms REP and VETS to form the mark THE REP FOR VETS does not create a less descriptive combination, but rather a highly descriptive phrase which will immediately inform those seeking a representative to advocate for veterans benefits (i.e., the relevant consumers of Applicants’ services) about the nature of Applicant’s services. *See In Re National Association of Veterinary Technicians in America, Inc.*, 2019 USPQ2d 269108, \*5 (TTAB 2019)(“Overall, the evidence shows that to consumers of veterinary medicine services, VETERINARY TECHNICIAN SPECIALIST immediately conveys knowledge of a significant feature of the services, namely, that they are provided by a veterinary technician who specializes in a type of veterinary medicine.”); *Performance Open Wheel Racing, Inc. v. United States Auto Club Inc.*, 2019 USPQ2d 208901, \*7 (TTAB 2019) (“the mark [NATIONAL MIDGET SERIES] as a whole is even more descriptive of Applicant’s [automobile racing events] than its individual components standing alone.”).

Applicants argue that the mark THE REP FOR VETS is not highly descriptive of its “advocacy services namely, legal, and paralegal and non-attorney representative

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<sup>20</sup> January 17, 2020 Response, TSDR 32.

services for claimants of veteran's benefits.”<sup>21</sup> Applicants argue that the words REP and VETS do not necessarily connote “representative” and “veteran” because each term has alternate definitions, such as “repetitions” and “veterinarian.”<sup>22</sup> It is well settled that the mere descriptiveness of a term is not assessed in a vacuum but in connection with the recitation of services listed in the application. *See In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (“Descriptiveness of a mark is not considered in the abstract. Rather, it is considered in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.”); *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012) (“In addition, to the extent applicant is arguing that TALENT has different meanings, the fact that a term may have different meanings in other contexts is not controlling on the question of descriptiveness.”). The services identified in the Application expressly refer to “veterans” and use the word “representative,” leaving no doubt what REP and VET mean as used in Applicants’ mark.

Applicants’ evidence of third party registrations for marks including the terms VETS or REP in which those terms are not disclaimed does not support a different conclusion. Applicants contend:<sup>23</sup>

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<sup>21</sup> 8 TTABVUE 12-20.

<sup>22</sup> January 17, 2020 Response, TSDR 48-49, 52.

<sup>23</sup> 8 TTABVUE 18.

Here, not only do these numerous third-party registrations and applications belie the notion that consumers perceive “REP” or “VET” to be descriptive terms for “representative” and “veteran,” but it would be inconsistent to now make the determination that the proposed mark, THE REP FOR VETS, is “highly descriptive” of Applicant’s services, in view of the fact that in numerous past instances “REP” or “VET” were not even considered to be “merely descriptive” of the respective goods/services.

Whether the terms REP and VETS are disclaimed in registered marks for different goods and services has little, if any, relevance to the determination of the degree of descriptiveness of the mark THE REP FOR VETS for “advocacy services namely, legal, and paralegal and non-attorney representative services for claimants of veteran’s benefits.” While a disclaimer is an admission that a term is not inherently distinctive, the reverse is not true. *See Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (disclaimer is an admission of descriptiveness at the time the disclaimer was made). The absence of a disclaimer does not mean that a word or phrase in a registration is distinctive in the registered mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (“[T]he record evidence shows that, regardless of whether ‘Co.’ and ‘Club’ were disclaimed, they do not serve source-identifying functions). *See also In re RiseSmart Inc.*, 104 USPQ2d at 1933 (TTAB 2012) (“most of the marks in the registrations appear to be slogans and, as such, a disclaimer of the individual word would not be required”).

Third-party registrations “are not conclusive on the question of descriptiveness” especially where, as here, the registrations are for different goods and services. *See In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977) (disregarding third-party registrations including the term “SCHOLASTIC” on grounds that they

did not involve the services set forth in the application before the Board). Finally, even if there were third-party registrations for representation services or veterans services in which the terms REP or VETS were not disclaimed, the Board “must decide each case on its own merits.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (finding that prior registrations of marks including the term ULTIMATE “do not conclusively rebut the Board’s finding that ULTIMATE is descriptive in the context of this mark.”).

In sum, Applicants’ alternate definitions and third party registrations do not outweigh the record evidence demonstrating that, as applied to Applicants’ representation services for veterans, the mark THE REP FOR VETS is highly descriptive.

**B. Applicants’ Evidence Does Not Demonstrate Acquired Distinctiveness**

In determining whether a mark has acquired distinctiveness, or secondary meaning, the Board may consider the following factors: “(1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.” *Converse, Inc. v. ITC*, 909 F.3d 1110, 1120 (Fed. Cir. 2018); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). No one factor is determinative. *In re Steelbuilding.com*, 75 USPQ2d at 1424.

In support of its claim of acquired distinctiveness, Applicants submitted with their application a statement that “The mark has become distinctive of the goods/services through the applicant’s substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement,” and a claim of ownership of Registrations Nos. 3875150 and 4124823. Applicants later supplemented the claim of acquired distinctiveness with the declaration of Joint Applicant Harry J. Binder, and exhibits showing Applicants’ use of the mark including its Facebook page, Applicants’ website, screenshots from its television commercials, Applicants’ listings with third party websites FindLaw and the Better Business Bureau, and the summary results of a Google search for THE REP FOR VETS.

With respect to Applicants’ claimed prior registrations, neither demonstrates acquired distinctiveness of the THE REP FOR VETS mark as applied to Applicants’ services. Registration No. 3875150 issued November 9, 2010 on the Supplemental Register for the same mark and services as listed in the current application. A party may not base a claim of acquired distinctiveness on ownership of a registration issued on the Supplemental Register. *See In re Snowizard, Inc.*, 129 USPQ2d 1001, 1105 fn 10 (TTAB 2018); *In re Cannon, Inc.*, 219 USPQ 820, 822 n.2 (TTAB 1983). Registration No. 4124823 issued April 10, 2012 on the Principal Register for the same literal mark and a design, all wording disclaimed, for the same services as listed in the current application. On November 16, 2018 this registration was canceled under Trademark Act Section 8, 15 U.S.C. 1058, and the claim was deleted from the application. A claim

of acquired distinctiveness may not be based on a registration that is cancelled or expired. *See In re Koninklijke Philips Elecs. N.V.*, 112 USPQ2d 1177, 1186 (TTAB 2014); *In re BankAmerica Corp.*, 229 USPQ 852, 853 (TTAB 1986). In addition, a claim of acquired distinctiveness based on a prior registration may not be based on disclaimed wording in that registration. *See La. Fish Fry*, 116 USPQ2d at 1265 (“Disclaiming unregistrable components prevents the applicant from asserting exclusive rights in the disclaimed unregistrable terms.”); *Kellogg Co. v. Gen. Mills, Inc.*, 82 USPQ2d 1766, 1771 n.5 (TTAB 2007); *In re Candy Bouquet Int’l, Inc.*, 73 USPQ2d 1883, 1889-90 (TTAB 2004).

We address Applicants’ evidence of “third party references to the Applicant,” which we construe as third party references to the THE REP FOR VETS mark.<sup>24</sup> The Facebook<sup>25</sup> pages display the mark in the header on the home page and the “customer interaction” consists of two hidden comments and a total of ten “likes” to two posts, and the general information that the page is liked and followed by almost 600 people. There is no specific nexus between the visitor to the page and Applicants’ proposed mark.<sup>26</sup> Applicants’ website features two “testimonials from customers” which discuss the quality of Applicants’ services, but the record does not include the amount of

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<sup>24</sup> 8 TTABVUE 8.

<sup>25</sup> We note that social media platforms such as Facebook are online tools for promotion. *See Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1688 (Fed. Cir. 2018) (Plaintiff “further promotes its products via catalog and direct mail, a daily blast e-mail, customer calls, and on social media platforms, including Twitter, Instagram, Pinterest, and Facebook.”).

<sup>26</sup> January 17, 2020 Response, TSDR 30-33.

traffic to Applicant's website.<sup>27</sup> Finally, the summary pages of Applicants' Google<sup>28</sup> search for THE REP FOR VETS include results mixing the mark THE REP FOR VETS with the abbreviation REP FOR VETS, a result stating similar services are offered by "vet reps" and a side bar noting that searches also ask for "vet reps."<sup>29</sup> *See In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1158 (TTAB 2019) ("The Google search result summaries illustrate little more than Applicant's size, marketing and promotional efforts, and the quality of the search engine optimization techniques it claims to use."). We do not find that the number or nature of the "third party references" show that the mark THE REP FOR VETS has acquired distinctiveness and identifies the source of Applicants' services.

We turn to the declaration of Joint Applicant Harry J. Binder. Mr. Binder avers that the mark THE REP FOR VETS has been in continuous and exclusive use in commerce since at least January 2010 with the services listed in the application; that for the period of almost two and a half years from 2017 to May 2019, Applicants generated nearly \$10 million in revenue from its THE REP FOR VETS services and spent nearly \$2.5 million in advertising and promotion of the mark through television advertisements, Google advertisements, Applicants' website, Applicants' Facebook page, and "related web advertisements."<sup>30</sup>

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<sup>27</sup> *Id.* at TSDR 36, 38.

<sup>28</sup> We take judicial notice that "Google" is a trademark for a search engine. Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/google>. Accessed 9 Sep. 2020.

<sup>29</sup> *Id.* at TSDR 98-104.

<sup>30</sup> 8 TTABVUE 8-9; June 27, 2019 Response, TSDR 4-6.

While ten years of use is significant, the length of time in use alone does not equate to acquired distinctiveness for a highly descriptive term. *See SnoWizard*, 129 USPQ2d at 1006 (length of use of mark for over nine years insufficient by itself to bestow acquired distinctiveness); *Target Brands, Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007) (“Applicant’s continuous use since 1992 is a fairly lengthy period, but not necessarily conclusive or persuasive on the Section 2(f) showing.”); *In re Kalmbach Publ’g Co.*, 14 USPQ2d 1490, 1494 (TTAB 1989) (for highly descriptive term, applicant’s statement of long use of a purported mark was insufficient to establish distinctiveness, absent specific evidence of the extent of the mark’s exposure to the purchasing public and of the purchasers’ perception of the asserted mark).

Similarly, while the nearly \$10 million in revenue in two and a half years derived from services under the mark is a substantial sum of money, without information regarding the pricing for Applicants’ services and the volume of customers, the revenue does not necessarily equate to acquired distinctiveness for a highly descriptive term. That is, we cannot assume that the revenue is provided by a large base of customers who have encountered Applicant’s mark. In fact, Applicants’ FindLaw listing explains Applicants’ contingency fee system, and that the government caps fees at 20 per cent of any past due benefits, a system which can generate a large amount of revenue from a small number of clients.<sup>31</sup> So, without more, we decline to find that Applicants’ revenues demonstrate acquired distinctiveness.

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<sup>31</sup> January 17, 2020 Response, TSDR 106.

The last evidence to consider is Applicants' expenditure over two and a half years of \$2.5 million in promotion of the mark. This evidence also suffers from lack of context, in this case, the unknown number of potential and actual customers exposed to Applicants' promotional efforts or proposed mark through television advertisements, Google advertisements, Applicants' Facebook page and website, and unspecified "related web advertisements." While each of the web-based ads are presumably available to anyone with an Internet connection, a website with no visitors is no aid to acquiring distinctiveness as a mark. *See In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1830 (TTAB 2011) ("On balance, we find that the data obtained from the www.Alexa.com web site measuring Internet traffic confirms the comparatively obscure nature of the third-party usages.").

Applicants supply two screenshots from the ispot.tv website which Applicants describe as "pertinent statistics as to the amount of national coverage each [television] commercial received."<sup>32</sup> The screenshots state the "Shell Shocked" TV commercial for THE REP FOR VETS was 15 seconds long, had 667 national airings, recently aired on Guy's Grocery Games on the Food Network, and last aired July 31, 2019; and the "Made It Home" TV commercial was 15 seconds long, had 340 national airings, recently aired on North Woods Law on Discovery Channel, and last aired April 25, 2019.<sup>33</sup> While this is a significant amount of airings, there is no tv rating or other evidence indicating how many people viewed Applicant's television ads, or, if

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<sup>32</sup> 8 TTABVUE 8.

<sup>33</sup> January 17, 2020 Response, TSDR 26-28.

the actual audience numbers were not available, what the average audience was for television ads aired during those programs. *See Performance Open Wheel Racing, Inc. v. United States Auto Club Inc.*, 2019 USPQ2d at \*10 (TTAB 2019) (“Likewise, with respect to Mr. Miller's testimony that select NATIONAL MIDGET SERIES events are broadcast live by Speed Shift TV, Applicant did not provide any testimony or evidence as to how many events have been broadcast or how many people viewed them.”).

Applicants contend that they are the only user of the term THE REP FOR VETS and there is no competitive need for others in the industry to use the term THE REP FOR VETS.<sup>34</sup> While the exclusivity of Applicants' use is a factor to be considered in determining acquired distinctiveness, the law is clear that being the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); *In re Hunter Fan Co.*, 78 USPQ2d 1474, 1477 (TTAB 2006). *See also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first”) (citation omitted).

In short, while the record includes no evidence showing third party use of THE REP FOR VETS, we balance that against the substantial evidence that a “representative” is the term used by the VA to refer to those who, like Applicants, the

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<sup>34</sup> 8 TTABVUE 19

VA has accredited to advocate for veterans benefits; that the evidence shows “representative” or “rep” is used by those third parties representing veterans seeking benefits from the VA; and that the term VETERAN or VET often appears in close proximity, if not immediately adjacent, to the term “representative” or “rep” when third parties describe the same services offered by Applicants.

Considering all the evidence of record, especially in view of the highly descriptive nature of THE REP FOR VETS mark when applied to services which include veteran representation, Applicants have failed to carry the burden of showing that, in the minds of the public, the primary significance of the term THE REP FOR VETS is to identify the source of the services. Accordingly, we find that Applicants have failed to demonstrate that their mark has acquired distinctiveness under Section 2(f) of the Act.

## **II. Decision**

The refusal to register Applicants’ mark THE REP FOR VETS on the ground of mere descriptiveness and an insufficient showing of acquired distinctiveness is affirmed.